# In the Supreme Court of the United States

October Term 1976

## No. 76-770

WILLIAM CAHN,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE PETITION FOR CERTIORARI

JOSEPH BEELER
*Chairman, Amicus Curiae Committee*
The National Association of Criminal Defense Lawyers
2000 South Dixie Highway
Miami, Florida 33133

MELVIN B. LEWIS
*Of Counsel*
315 South Plymouth Court
Chicago, Illinois 60604

MIAMI REVIEW — 371-4853 — 377-3721

# *Index*

## *Citations*



in the

# Supreme Court

of the

# United States

October Term 1976

NO. 76-770

WILLIAM CAHN,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE PETITION FOR CERTIORARI

### Interest of Amicus

The membership of the National Association of Criminal Defense Lawyers consists of approximately one thou-

sand lawyers, who are citizens of almost every State of the union, and almost all of whom are actively engaged in the defense of persons accused of crime. One of its primary institutional objectives is to prevent the erosion of constitutional safeguards, with special emphasis to developments tending to penalize or impair the exercise of the Sixth Amendment right to counsel. This brief is tendered in the discharge of that organizational objective. It is filed with the consent of all parties.

Amicus believes that the scope of certain questions framed by the petitioner necessarily implicates issues of special concern to amicus. This brief is limited to suggestions concerning the importance of those issues.

Amicus supports the petitioner's prayer that certiorari be granted.

## Opinions Below and Jurisdiction

In this aspect, amicus adopts the recitations of the Petition for Certiorari.

## Questions Presented

The issues of special concern to amicus, implicit within the questions framed by the petitioner, are as follows:

1. Does the prohibition against retaliatory escalation of jeopardy, as enunciated in *Blackledge v. Perry*, 417 U.S. 21 (1974) and *North Carolina v. Pearce*, 395 U.S. 711 (1969) apply only to a *successful* assertion of rights by an accused?



2. Where a prosecutor deliberately omits certain charges from an indictment in an attempt to render irrelevant the defendant's theory as anticipated through his grand jury testimony; and where the trial of that indictment results in a hung jury; may the prosecutor then justify a superseding indictment which includes the additional charges originally withheld, by stating that such additional charges are tactically desirable in the light of defense contentions exposed during the first trial?

## Constitutional and Statutory Provisions Involved

Amicus would suggest that this case involves the following constitutional provisions, in addition to that cited by petitioner:

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation * * * and to have the Assistance of Counsel for his Defence.

## Statement of the Case

Amicus adopts and relies upon the statement of facts recited by the petitioner.

## Reasons for Granting the Writ

### I

### LIMITING DUE PROCESS PROTECTION TO "SUCCESSFUL" ASSERTIONS OF RIGHTS INFRINGES THE RIGHT TO FULL ASSISTANCE OF COUNSEL.

Petitioner was originally tried on seven counts. The trial of that indictment ended with a hung jury. He was then re-indicted on forty-six counts.

It is beyond question that the additional charges were brought because, and only because, the first trial did not result in conviction.

Facially, that would appear an obvious violation of the doctrines of *Blackledge v. Perry* 417 U.S. 21 (1969) and *North Carolina v. Pearce*, 395 U.S. 711 (1969)

The Court of Appeals held those authorities inapplicable because, in the view of that court, *Blackledge* and *Pearce* forbid only "penalizing a defendant for his *successful* assertion of his rights." (Pet. at 33) (Emphasis added)

That is not a misreading of the opinion, nor is it an inadvertent statement by the Court of Appeals. Instead, it reflects the acceptance of the government's view of those cases. In its brief to the Court of Appeals, the government stated:

> "We do not believe that [*Blackledge* and *Pearce*] support the proposition which [petitioner] deduces from them. They stand at most for the proposition that where the defendant is *successful* in setting aside a conviction, or has *successfully* asserted a right for which he should not be punished, the charges against him may not be increased or multiplied without some justification. But here the defendant did not *successfully* assert any right." (Brief for the Appellee at 24). (Emphasis added).



Nothing in *Blackledge* or *Pearce* can fairly be read as limiting the prohibition against retaliatory augmentation of jeopardy to cases wherein the retaliation is directed against a successful defense. Indeed, *Blackledge* and *Pearce* would lose the bulk of their force as thus interpreted. Those cases denounce the chilling effect upon the assertion of constitutional rights which would derive from the penalizing of an attempt to assert those rights. Such chilling is equally effective as a deterrent regardless whether retaliation is provoked by ultimate success or ultimate failure; for the decision to asset a right is seldom if ever the product of an unqualified prediction of success. The outcome of any attempt to exercise a constitutional right is essentially unpredictable. But obviously, a defendant would be no less deterred from an appeal if he believed that additional charges might result from the affirmance of a conviction, than if he believed that additional charges might result from a reversal.

In the view of the Court of Appeals, a convicted defendant might be told, with constitutional propriety,

> "You have a constitutional right to appeal. If you appeal and are successful, there will be no retalia-

> tion against you. But if you appeal and are unsuccessful, we will do our best to see whether there might be some additional charge which could be brought against you."

We suggest with some confidence that a defendant thus advised, would be no less hesitant to appeal than would a defendant who is flatly told:

> "If you appeal and obtain a new trial, we will increase your sentence if you are convicted a second time."

Indeed, the "success" test is likely to be far more chilling than would the converse rule. For example, as applied to appeals, there are very many more affirmances of convictions than there are reversals.

Thus, the "success" test would render the *Blackledge-Pearce* doctrine virtually meaningless. The "success" test can also lead to absurd anomalies as shown by the case at bar. By the government's theory, if a petitioner had been convicted at the first trial, and the conviction then reversed on appeal, that would have represented "success", thus precluding retaliatory actions. A mistrial, on the other hand, is viewed as a "failure", or at least as a "non-success", rendering additional retaliatory charges permissible. A legal principle which treats a conviction, subsequently reversed, as conferring greater collateral rights than would a mistrial, may with restraint be characterized as artificial.



If a mistrial is to be regarded as a lack of "success." then the same may be said *a fortiori* of such defense moves as motions to suppress, jury demands, and, indeed, a request for counsel, regardless whether such requests are granted or refused. Such actions, like a mistrial, do not work a substantive change in the defendant's status. We suggest that the right to counsel is no less subject to impairment by the "success" test, than is any other constitutional right. Quite beyond the fact that the very presence of counsel reflects a constitutional right in itself, among the primary functions of counsel is to advise his client of the existence of all other rights and to urge those rights in his behalf. If assertion of those rights is to invite retaliation, the advice itself must be temporized and the status of the decision to assert a right is seldom if ever the product of an advisor thereby denigrated. Any knowledgeable client must feel less than free to act on his lawyer's advice to exercise a constitutional right if he believes that unless such exercise results in ultimate success he is inviting retaliatory escalation of jeopardy.

Finally, we are constrained to point out that the Second Circuit "success" test appears to be in direct conflict with the District of Columbia Circuit case of *United States v. Jamison*, 164 U.S. App. D.C. 300, 505 F.2d 407 (1974) and the recent Sixth Circuit case of *Hayes v. Cowen*, ____ F.2d ____, 20 CrL 2308 (Dec. 30, 1976).*

---

* One further note may be in order. Petitioner has contested the accuracy of the Second Circuit', statement that he "did not raise this claim before trial as required . . . ." (Pet. at 33). Under *Blackledge v. Perry*, 417 U.S. 21, 29-31 (1974) failure to raise the claim pre-trial would not in any event foreclose review.

## II

## THE PROSECUTOR'S OBTAINING OF THE SUPERCEDING INDICTMENT VIOLATED RIGHTS PROTECTED BY THE INTERPLAY OF THE PRIVILEGE AGAINST SELF-INCRIMINATION, THE GRAND JURY SAFEGUARD, AND OUR ACCUSATORIAL SYSTEM OF CRIMINAL JUSTICE.

In this case, the petitioner was forced to become something more than a mere source of information to the prosecutor. He was converted into an involuntary advisor on questions of policy and strategy, quite literally charged with the development of the prosecution work product.

It was petitioner's basic theory that the double-billings constituted a permissible technique for the payment of informants.

He was called before a grand jury. The prosecutor, evaluating petitioner's story, carefully selected for his indictment seven transactions as to which the defense theory was deemed least applicable.

Trial on those charges ensued, ending in a hung jury. Evaluating the defense at that trial, the prosecutor concluded that he would derive a tactical advantage from reindicting adding other charges which he had previously withheld in the light of the defendant's position as originally understood by the prosecutor.

In the Court of Appeals, that rationale was viewed as an acceptable explanation for the augmentation of



charges. As there viewed, the prosecutor was not indulging in impermissible retaliation. Instead, he was simply using the grand jury to adjust his strategy in the light of his new understanding of the nature of the defense.

If the grand jury as employed in this case is viewed as having any independent function at all—if it is viewed as anything other than a supine rubber stamp—then it necessarily follows that the prosecutor was using the grand jury for the impermissible purpose of developing facts against a defendant then under indictment.

If, on the other hand, the grand jury function in this case is viewed as simple endorsement of the prosecutor's request for additional charges without additional evidence, then it necessarily follows that the Court of Appeals has approved the concept of a "floating" charge tactically determined by the defendant's reaction rather than by the prosecution's evidence.

It is one thing to say that in the light of the developments at an earlier trial, a prosecutor may introduce new evidence, or adopt new arguments at a second trial. Further, if a defendant's evidence produces proof of a different offense, it may well be proper to charge him with that offense regardless of the outcome of the trial at which his collateral criminality is exposed. But it is very much a different thing to say that after an indictment has been returned, the prosecutor may revise the charge itself to meet a defense theory disclosed in the course of resistance to an unsuccessful attempt at conviction.

Conceptually, it is an abandonment of all claim of constitutional propriety to adapt a charge to the nature of the

anticipated defense. An accusatorial system of jurisprudence depends for its definitional vitality upon the proposition that a charge, no less than a conviction, must reflect the strength of the prosecution rather than the weakness of the defense. The "floating" charge — the charge which adapts itself, chameleon-like, to the nature of the defense — can have no place in such a system.

In the case at bar, such a charge is deemed not merely tolerable: It is viewed as an acceptable predicate for an increase in jeopardy after disclosure of the nature of the defense — not because the defense has confessed some new crime, but because the prosecution now sees an easier path to conviction.

We urge that the accusatorial system of justice is directly imperiled by an approach such as that reflected by the judgment below. Accordingly, we endorse the petitioner's prayer for writ of certiorari.



## Conclusion

For the foregoing reasons, we urge that certiorari be granted and that the judgment below be reversed.

Respectfully submitted,

Joseph Beeler
*Chairman, Amicus Curiae Committee*
The National Association of
Criminal Defense Lawyers
2000 South Dixie Highway
Miami, Florida 33133

Melvin B. Lewis
*Of Counsel*
315 South Plymouth Court
Chicago, Illinois 60604